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No. –

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

PAUL A. MASCIOPINTO,

*Petitioner,*

v.

MARIAN J. WHATLEY,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether, where the parties have stipulated that a plaintiff's compensatory damages are limited to $1,210, and where an offer of judgment in the amount of $5,000 has been presented and refused, a prevailing defendant should be entitled to recover costs under Fed.R.Civ.P. 68 as a matter of sound public policy?

2. Whether the 1983 amendment to Fed.R.Civ.P. 11, which allows a court to review and sanction offers intended for tactical advantage rather than reasonable settlement, constitutes a change of circumstances that requires a re-evaluation of the holding in *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 67 L.Ed.2d 287, 101 S. Ct. 1146 (1981), *i.e.* that Fed.R.Civ.P. 68 does not apply if a plaintiff recovers a judgment that it take nothing?

3. Whether a revision of this Court's holding that Fed. R.Civ.P. 68 does not apply to "take nothing" judgments would result in a greater number of settlements, the easing of crowded court dockets, and savings to litigants and the judicial system?

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In The

# Supreme Court of the United States

October Term, 1990

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**PAUL A. MASCIOPINTO,**

*Petitioner,*

v.

**MARIAN J. WHATLEY,**

*Respondent.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Paul A. Masciopinto ("Masciopinto") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is unreported. It is reprinted as App. 1-7 hereto. The opinions of the United States District Court for the Northern District of Illinois are unreported. The judgment and the opinions are reprinted as App. 8-15 and 16-20 hereto.

## JURISDICTION

Jurisdiction in the District Court was founded on Title 42 United States Code, Section 2000e-5(f)(3). Jurisdiction in the Court of Appeals was founded on Title 28 United States Code, Section 1291. The opinion and judgment of the Court of Appeals for the Seventh Circuit were entered on December 7, 1990. No rehearing was sought. This Court's jurisdiction is invoked under Title 28 United States Code, Section 1254(1).

## STATUTES AND RULES INVOLVED

Rule 68 of the Federal Rules of Civil Procedure reads as follows:

> **Offer of Judgment**
>
> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The

fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Rule 11 of the Federal Rules of Civil Procedure reads as follows:

**Signing of Pleadings, Motions, and Other Papers, Sanctions**

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not

signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

## STATEMENT OF THE CASE CONTAINING FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

The plaintiff-respondent Marian J. Whatley ("Whatley"), brought suit under Title 42 United States Code, Section 2000e-2(a)(1), basing jurisdiction on Section 2000e-5(f)(3) of the same Title. Her complaint, filed in the United States District Court for the Northern District of Illinois on April 14, 1989, consisted of four counts. Count I alleged discharge from employment because of plaintiff's sex. Count II alleged a pendent claim for discharge in retaliation for filing a worker's compensation claim. Count III alleged a pendent claim for slander. Count IV alleged a pendent claim for intentional infliction of emotional distress. The complaint named as defendants the corporate employer (which is a grocery store in Elmwood Park, Illinois) and four individuals who have ownership interests in the grocery store. The complaint also named as a defendant the petitioner, Paul Masciopinto ("Masciopinto"), who is not

an owner but was the head butcher at the store and Whatley's supervisor. Whatley was a meat wrapper.

It has been stipulated that Masciopinto does not read or write the English language and that he testified orally only with difficulty, although without an interpreter.

The complaint was premised upon a Charge of Discrimination and a Notice of Right to Sue neither of which name Paul Masciopinto. No written notice of that charge was ever given to Masciopinto; nor was any conciliation proceeding, with him as a target, ever conducted. On October 19, 1989, after discovery was closed, Masciopinto moved to dismiss for lack of jurisdiction, premised on three grounds: 1.) he was not named in the Charge or the Notice and was not served with notice of the charge; 2.) he was not an employer within the definition of the statute, but merely the head butcher, and therefore not within its coverage; 3.) the pendent claims had no independent basis of federal jurisdiction.

The District Court denied the motion to dismiss for lack of jurisdiction by an order which relied upon Whatley's lawyer's assertion that notice was given ". . . by [Masciopinto] being interviewed. . . ." No affidavit or other record support was provided for counsel's statement. Masciopinto moved for reconsideration and for a jurisdictional hearing. Whatley's attorney then filed a non-party's affidavit as to an "interview". The Court denied the motion for reconsideration. No jurisdictional hearing was ever held. Moreover, the person who had signed the affidavit that an "interview" had taken place was not called as a witness at the trial although her name was listed as plaintiff's witness on the Final Pretrial Order. No proof on this issue of jurisdiction was ever offered. Defendants moved for summary judgment. The Court ordered that motion to be taken with the trial.

After the rulings on the motions, all defendants, including Masciopinto, served an "Offer of Judgment Pursuant To Rule 68" (the "Offer") upon the attorney for Whatley. The Offer was in the non-allocated sum of $5,000 and was for all claims including costs and attorney fees. The Offer was refused.

The case proceeded through the pretrial steps and eventually Mrs. Whatley amended her complaint to focus on sexual harassment rather than dismissal. She had been employed in another job very quickly and never sought reinstatement. Masciopinto again answered and raised jurisdictional and other defenses.

On February 2, 1990 the Final Pretrial Order was entered. The stipulated and itemized compensatory damages of Whatley under Title VII are shown in the Final Pretrial Order to be the sum of $1,210. Plaintiff sought more than $300,000 in compensatory and punitive damages on the pendent counts.

The case proceeded to a combined trial. A jury was empaneled as to (pendent) Counts II, III and IV. At the close of plaintiff's case a directed verdict of not guilty was entered for all defendants as to Counts II and III, and as to two of the owner/defendants as to Count IV. The case was submitted to the jury on the balance of Count IV. The jury was given a punitive damage instruction and a punitive damage verdict form. The jury, however, returned a not guilty verdict as to the remaining defendants, including Masciopinto. Neither compensatory nor punitive damages were awarded.

The District Court thereafter heard separate final arguments as to Count I (the Title VII claim) and entered judgment. The court found in favor of all defendants, and against plaintiff, and entered judgment accordingly on March 30, 1990.

All defendants had made a Rule 68 Offer of $5,000 for all claims, including all costs and fees, in December, 1989, which offer was refused. After the judgment in their favor all the defendants moved for an award of attorneys' fees and costs to them under Rule 68 Fed.R.Civ.P. and Title 42 United States Code, Section 2000e-5(k). Masciopinto's attorney filed a detailed and itemized affidavit showing fees of $13,512 and other costs of $725 occurring after refusal of the Offer. The District Court denied the motion. An appeal was taken from the denial of fees and costs to Paul Masciopinto. The other defendants, who were represented by separate counsel throughout the proceedings, did not appeal. Jurisdiction of the appeal was authorized by Title 28 United States Code, Section 1291. The Seventh Circuit Court of Appeals affirmed. The unpublished opinions of the Court of Appeals (App. 1-7) and of the District Court (App. 8-15 and 16-20) are attached hereto.

## REASONS FOR THE ALLOWANCE OF THE WRIT

### The Increasing Burdens Of Litigation Create Problems That Must Be Solved

There can be no doubt that the ever-increasing volume of cases and the burgeoning expenses of litigation are pulverizing the civil justice system on every level—federal, state and local. Recourse to litigation seems to be increasing in popularity at the expense of out-of-court resolutions of problems. It is also true that arbitration and alternative dispute resolution are growing; but those mechanisms, by and large, handle contract disputes among relatively sophisticated disputants. The civil justice system is the only

available method for the great bulk of contested matters. The Congressional findings in the Judicial Improvements Act of 1990 (Public Law 101-650, sec. 102; approved Dec. 1, 1990, 10C U. S. Cong. News, 1990) and the mandate for development and implementation of civil justice expense and delay reduction plans (*ibid.*, sec. 103) provide compelling evidence of the facts.

**Settlements Must Be Encouraged**

It is also beyond cavil that compromise and settlement are indispensable. Were it not for settlements, the problems in the courts would be exponentially worse. Yet, the single tool in the Federal Rules of Civil Procedure workshop that is specifically designed to achieve settlements is virtually unused: Rule 68. This lack of use has occurred because the extant decision of this Court has had the effect of discouraging lawyers and judges from its use.

**Rule 68 Has Been Interpreted Too Restrictively**

In 1981 this Court decided that the phrase ". . . judgment finally obtained by the offeree . . ." in Rule 68 Fed. R.Civ.P. can only mean an affirmative judgment in favor of that party. *Delta Air Lines, Inc. v. August*, 400 U.S. 346, 67 L.Ed.2d 287, 101 S. Ct. 1146. The facts of that employment discrimination case were particularly harsh. The defendant served to plaintiff a formal offer of judgment in the amount of $450. The plaintiff had sought, *inter alia*, reinstatement and $20,000 in back pay. The plaintiff refused the offer, went to trial and lost. The cost-shifting of Rule 68 would have entitled a large corporate defendant to recover its attorneys' fees and costs from an out-of-work individual. The District Court, clearly wanting to

avoid that result, held that the $450 offer had not been made in "good faith", while the Court of Appeals found it was not a "reasonable" settlement offer. This Court, while affirming, rejected both premises and ruled instead that the "plain language" of Rule 68 did not allow application to a judgment where the offeree took nothing. It is clear from the text of the opinion, however, that this Court had serious reservations about the size of the offer in relation to the injury suffered: witness references in the opinion to "meaningless act"; "nominal settlement offer"; "token offer"; "sham offers"; "utterly frivolous settlement offer"; "nominal settlement offers"; "settlement offer of one penny". And yet the Court did not want to engraft a reasonableness quotient onto the Rule.

**A Revised View Of Rule 68 Is Consistent With Other Federal Rules**

Faced in *Delta Air Lines* with an example of what it apparently considered overreaching by a defendant, the five justice majority found that the use of "judgment" in the Rule 68 phrase "judgment finally obtained by the offeree . . . not more favorable than the offer" did not apply to any judgment entered in favor of a defendant, but only to a situation where a plaintiff recovered a judgment, in favor of plaintiff, but in an amount less than the offer.

As Justice (now Chief Justice) Rehnquist noted in dissent, this "plain language" interpretation of "judgment" is completely at odds with the definition of the term in Rule 54(a) of the Federal Rules of Civil Procedure. In that provision, "judgment" is defined to include a "decree and any order from which an appeal lies." He then wrote:

Unquestionably, respondent "obtained" an "order from which an appeal lies" when the District Court entered its judgment in this case. Certainly, respondent did not subscribe to the Court's reasoning because she immediately sought review in the Court of Appeals of the "judgment" which had been entered against her. Rule 68, when construed to include a traditional "take nothing" judgment, see, Appendix to Fed. Rules Civ. Proc. Forms 31 and 32, as well as a judgment in favor of the plaintiff but less than the amount of the offer, thus fits with the remaining parts of the Federal Rules of Civil Procedure pertaining to judgments and orders in a manner in which the drafters of the Rule surely must have intended. To circumscribe Rule 68 in the manner in which the Court does is to virtually cut it adrift from the remaining related portions of the Federal Rules of Civil Procedure, a construction which could be justified only by the strongest considerations of history and policy. Our cases do not support the proposition that such a construction will never be given to a rule or statute, but they do indicate that only the strongest support in the legislative history warrants such a result. *Chemehuevi Tribe of Indians v. Federal Power Commission* (Citation omitted) *Delta Air Lines*, 450 U.S. at 371, 67 L.Ed.2d at 304, 101 S. Ct. at 1159.

**The Present Interpretation Of Rule 68 Does Not Encourage Settlements In Problem Cases**

The second reason adduced in *Delta Air Lines* was an interpretation of the purpose of Rule 68. Finding that the Rule was intended to encourage the settlement of litigation, the majority was concerned that defendants would be given the power to deprive district judges of discretion with respect to cost awards by making a penny offer, thereby depriving plaintiffs of bargaining leverage. How-

ever, as the dissent noted, a rule designed to encourage settlement should require plaintiff as well as defendant to take a long hard look at his "hole card".

The dissent agreed that Rule 68 is intended to facilitate settlement but pointed out that the majority's restriction of the use of Rule 68 to cases in which a judgment is entered in favor of the plaintiff for an amount less than the defendant's offer results in an anomaly: a plaintiff with a case that is marginal to the point of frivolity has license to run a bluff, while a plaintiff with potential winning cards has to face a significant penalty if its hand is strong, but not as strong as it thinks. As the *Delta Air Lines* dissent noted, this can result in win-nothing cases clogging the courts at no cost to those plaintiffs, while plaintiffs with cards of some merit are burdened with significant expenses if they win less than the amount offered by defendants.

**The Present Interpretation Of Rule 68 Has Unintended Results**

The other anomalies created by the ruling in *Delta Air Lines* are abundant. The clearest example would be the predicament of a plaintiff who had rejected an offer (whether sham or not is irrelevant) and then succeeds in securing a moral victory in the nature of a nominal judgment. Such a plaintiff would be far worse off by having achieved a moral victory rather than abject defeat. Less obvious, but just as real a problem, is the reluctance of a District Judge to award a moral victory, or even a small award, out of concern that an offer of judgment (whether sham or not is irrelevant) had been made and refused. What has happened is that the opinion in *Delta Air Lines* has simply rendered Rule 68 too dangerous and ambiguous for regular use.

A startling example of one of these unintended results can be seen in *Hopper v. Euclid Manor Nursing Homes, Inc.*, 867 F.2d 291 (6th Cir. 1989). In that case the District Judge improperly vacated a nominal judgment for plaintiff in order to invoke the rule of *Delta Air Lines* rather than award costs to the defendant. The Sixth Circuit reversed and remanded the case "for a determination of appropriate costs under Rule 68", *Hopper*, 867 F.2d at 296. The *Hopper* case (*supra*) held that the correct precedent for the District Judge to have applied was the only other recent Rule 68 case decided by this Court, *Marek v. Chesny*, 473 U.S. 1, 87 L.Ed.2d 1, 105 S. Ct. 3012 (1985). It is fair to speculate that the District Judge in *Hopper*, now familiar with the rule of *Delta Air Lines*, would be very reluctant in the future to award nominal judgments or moral victories. This surely is not a paradigm for our justice system.

**Rule 68 Is Intended To Be Impartial**

The decision in *Marek v. Chesny*, 473 U.S. 1, 87 L.Ed.2d 1, 105 S. Ct. 3012 (1985), recognizes that Rule 68 can be an important factor in encouraging settlements. The Court there made it clear that Rule 68 is intended to operate impartially. The Court, through Chief Justice Burger, wrote:

> Merely subjecting civil rights plaintiffs to the settlement provision of Rule 68 does not curtail their access to the courts or significantly deter them from bringing suit. Application of Rule 68 will serve as a disincentive for the plaintiff's attorney to continue litigation after the defendant makes a settlement offer . . . . Moreover, Rule 68's policy of encouraging settlements is neutral, favoring neither plaintiffs nor defendants; it expresses a clear policy of favoring settlement of all lawsuits. Civil rights plaintiffs—along with other plaintiffs—who reject an offer more favorable

> than what is thereafter recovered at trial will not recover attorney's fees for services performed after the offer is rejected. But, since the Rule is neutral, many civil rights plaintiffs will benefit from the offers of settlement encouraged by Rule 68. Some plaintiffs will receive compensation in settlement where, on trial, they might not have recovered, or would have recovered less than what was offered. And, even for those who would prevail at trial, settlement will provide them with compensation at an earlier date without the burdens, stress, and time of litigation. In short, settlements rather than litigation will serve the interests of plaintiffs as well as defendants. *Marek*, 473 U.S. at 10, 87 L.Ed.2d at 10, 105 S. Ct. at 3017.

In summary, the holding of *Delta Air Lines* has practical effects that are very undesirable; and yet it does not preclude sham offers that are intended solely for tactical advantage or psychological effect because it does not address the nature and amount of the offer at all. The only way to cure the unscrupulous use of Rule 68 to achieve an unfair advantage for a defendant is to focus on the content of the offer itself. But the other side of the coin is just as important. The only way to cure abject obstinacy, or self-righteousness, or spiteful behavior by a plaintiff is to make sure there is a downside risk. At present Rule 68 does not serve the full function of which it is capable since it does not focus on the terms of the offer. It provides no downside risk in the weakest cases but only in the middling cases.

## Acceptance Of The Rule 68 Offer In This Case Would Have Benefitted All Parties

The amount offered in the instant case was neither a sham nor an unrealistic offer. It exceeded by 300% the stipulated Title VII compensatory damages. It was made

in good faith and in accordance with the requirements of the Rule. The Offer was made after discovery and after Masciopinto had done everything possible to get the District Judge to dismiss the case without further expenditures of time. Masciopinto is simply a working man. He is not a moneyed corporation, nor even an owner of the food store. It was obvious that he had been forced by his employer to get his own attorney. He was kept in the case only by the increasingly expansive reading that is being given to the definition of "employer" in Title VII litigation. To deny Masciopinto costs (including attorneys' fees) under Rule 68 would be both illogical and unjust, and would leave the Rule in a confusing and ineffective posture. Had Whatley prevailed to the extent of one dollar, or even one cent, under the *Delta Air Lines* holding she would have been liable for costs under Rule 68. Had no Rule 68 offer been made, she and her attorney would surely apply for fees regardless of how nominal the judgment might be and despite a minuscule principal award. She should have taken the offer and saved Masciopinto and the other defendants, as well as the District Court, the substantial expenses of time and money that were incurred after her refusal. She sought a windfall rather than a reasonable adjustment of the dispute. But Whatley is hardly alone in that attitude. At present there is every incentive for a plaintiff to pursue litigation to the very end, especially if there is a possibility of punitive damages or enhanced damages or fees (*e.g.* "lodestar" fees). There simply are no disincentives at all.

**A Change Of Circumstances Has Occurred. Amended Rule 11 Can Be Used To Prevent Or Sanction Predatory Offers**

At the time the *Delta Air Lines* opinion was written in 1981, there was no effective provision in the civil rules

to dissect the content of an offer of judgment and subject it to careful analysis. In 1983, however, the amendment of Fed.R.Civ.P. 11 gave to the parties and judges that ability. While this Court has never ruled on whether or not an offer of judgment must be in writing and signed by an attorney, it seems clear that the requirements in Rule 68 of *serving* and *filing* the offer necessarily imply that the offer must be written. Cf. *Grosvenor v. Brienen*, 801 F.2d 944, 948 (7th Cir. 1986). Likewise the provision in Fed.R.Civ.P. 11 that "[e]very pleading, motion, and *other paper* . . . shall be signed by at least one attorney of record . . ." surely means that an offer of judgment must be signed by counsel. Thus, if relief under Rule 68 becomes an issue, the court has the power to analyze the content of the offer to determine whether or not it, for instance, was interposed for an "improper purpose" in the context of the facts and the law pertinent to the particular case. An "appropriate sanction" for a predatory offer could be denial of costs and fees to the represented party, or could be more comprehensive depending upon the extent of the individual attorney's breach of the personal and non-delegable responsibility of Rule 11. Cf. *Pavelic & LeFlore v. Marvel Group*, 493 U.S. ____, 107 L.Ed.2d 438, 110 S. Ct. 456. (1989).

**Rule 68 Can Be An Important Part Of Civil Justice Expense And Delay Reduction Plans**

No one can accurately predict how well a settlement procedure will work. Rule 68, however, has proved to have little impact as now structured and interpreted. If the "take nothing" judgment were reinstated to Rule 68 coverage, that action alone would send a very strong message to the bench and bar that Rule 68 is intended to be used and will be enforced. Then, if other settlement

attempts were not fruitful, a conscientious lawyer, who had learned the facts of the case and the applicable law as required by Rule 11, could help the judicial system by making a well grounded and warranted offer of judgment. A litigant who received such an offer would have to consult carefully before rejecting it. Very likely the number of settlements would increase. Most importantly, the very marginal cases would no longer be in a "shoot the moon" posture since there would be a downside risk.

## CONCLUSION

For the special and important reasons set forth herein, this petition for a writ of certiorari should be granted and the case should be set for briefing and oral argument.

Respectfully submitted,

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# APPENDIX

[Unpublished Order Not To Be Cited
Per Circuit Rule 53]

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued November 13, 1990
Decided December 7, 1990

Before

Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*

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MARIAN J. WHATLEY,

*Plaintiff-Appellee,*

No. 90-2406 v.

PAUL MASCIOPINTO,

*Defendant-Appellant.*

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Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 89 C 2976—Suzanne B. Conlon, *Judge.*

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## ORDER

Marian Whatley filed suit in federal court against her former employer, Super Low Food Center, its owners, and her former supervisor for sexual harassment in viola-

tion of Title VII and for intentional infliction of emotional distress. Before the trial, the defendants offered Whatley a settlement of $5,000 pursuant to Federal Rule of Civil Procedure 68. Whatley refused the offer. Subsequently, a jury returned a verdict in favor of the defendants on the intentional infliction of emotional distress claim and the court entered judgment in favor of the defendants on the Title VII claim. The defendants then moved for costs, including attorney's fees, pursuant to Rule 68 and 42 U.S.C. § 2000e-5(k). The district court denied the motion. Only defendant Masciopinto appeals, claiming that the district court erred in not allowing that recovery.

## I.

### A. *Costs Pursuant to Rule 68*

Federal Rule of Civil Procedure 68 states: "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." The Supreme Court has analyzed the plain language of Rule 68 and concluded that the rule applies only to the case in which a plaintiff obtains a judgment that is less favorable than the defendant's settlement offer. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981). In *Delta* the defendants prevailed and moved for costs pursuant to Rule 68. The plaintiff refused a settlement offer that the Seventh Circuit found had not been made in good faith. The Supreme Court stated that because Rule 68 does not apply when the judgment is entered in favor of the defendant, it was not necessary "to read a reasonableness requirement into the rule." *Id.* at 355.

Rule 68 alters the presumption of Federal Rule of Civil Procedure 54(d), *id.* at 351, which provides that "[e]xcept

when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; . . ." The *Delta* Court reasoned that the purpose behind Rule 68 is to encourage settlements, and because a prevailing party presumably can recover costs under Rule 54(d), Rule 68 places an added burden on a plaintiff to whom a settlement offer has been made. *Id.* at 352. The Court emphasized that where a defendant prevails, the trial judge still retains his Rule 54(d) discretion. *Id.* at 354. Masciopinto did not move for costs under Rule 54(d), perhaps because 42 U.S.C. § 2000e-5(k) precluded such recovery. *Id.* at 355-356 n.15.

We are bound by *Delta*, and under that authority a defendant is not entitled to recover his costs. Therefore, the denial of costs to Masciopinto was correct.

B. *Attorney's Fees Pursuant to 42 U.S.C. § 2000e-5(k)*

At the oral argument, we speculated that defendant may have waived his claim to attorney's fees under 42 U.S.C. § 2000e-5(k) because of "a jurisdictionally defective [1] Charge of Discrimination and [2] Notice of Right to Sue." However, his brief did state this as an issue and it and related matters were discussed in some detail in the argument section of his brief (Br. i and 12). In addition, the subject was addressed in plaintiff's brief (at pp. 4-7), thereby waiving any possible waiver argument. *Shelton v. Director, OWCP*, 899 F.2d 690, 692 (7th Cir. 1990). The reply brief considered this matter as well (at pp. 4-7).

Section 2000e-5(k) allows a prevailing party in a Title VII case to recover attorney's fees, 42 U.S.C. § 2000e-5(k), when a court finds a plaintiff's claim "frivolous, unreasonable, or groundless." *Christianburg Garment Co. v. Equal*

*Employment Opportunity Commission*, 434 U.S. 412, 422 (1978). In deciding the attorney's fees issue under § 2000e-5(k), the district court found that Whatley's claim was not frivolous. R. Item 124 at 3.

Masciopinto argues that he is entitled to attorney's fees under § 2000e-5(k), not because Whatley's claim itself was frivolous, but because it was frivolous to have added him as a defendant in view of so-called "jurisdictional" defects. His reasoning is that not only was he forced to defend a suit that he won even after making a good faith offer of settlement, he incurred legal expenses that he should never have had to incur because he was wrongly joined in this case in the first place. By analogy Masciopinto argues that because a complaint that violates jurisdictional requirements can be grounds for Rule 11 sanctions, *Dubisky v. Owens*, 849 F.2d 1034 (7th Cir. 1988), such a complaint should also be considered frivolous for purposes of awarding a prevailing party attorney's fees.

Masciopinto filed a motion to dismiss Whatley's complaint as to him on three supposedly jurisdictional grounds. The first was that he was not named in the Charge of Discrimination.[1] His argument is that a civil action may be brought only against the respondent named in the charge. *Eggleston v. Chicago Journeymen Plumbers, Etc.*, 657 F.2d 890, 905 (7th Cir. 1981). The only respondent named in Whatley's charge was Super Low Foods, the employer. This leads to his second ground, that he was not the plaintiff's employer. His argument was that he had no power to hire or set salaries and he was not in charge of the

[1] As part of this ground, he claims he was not given an EEOC "Notice of the Right to Sue," but the Notice form is of course for the benefit of a plaintiff and does not provide for the listing of a potential defendant.

overall operation of the store. His third ground was that Whatley's pendent state claims of intentional infliction of emotional distress has no independent basis of federal jurisdiction.

The district court addressed each of these grounds in its opinion denying the motion (R. Item 41): 1) Masciopinto was named in the charge as Whatley's "Department Manager" and had adequate notice of the charge during two interviews conducted by the EEOC, *Schnellbaecher v. Baskin Clothing Co.*, 887 F.2d 124, 126-27 (7th Cir. 1989) (exception to the general rule that a party must be named in the charge exists where the "unnamed party had adequate notice of the charge under circumstances where the party has been given the opportunity to participate in conciliation proceedings aimed at voluntary compliance"; 2) Deposition testimony by both Masciopinto and his co-defendants established that he was Whatley's supervisor; and 3) Pendent jurisdiction existed under the guidelines of *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). Order, November 6, 1989. Masciopinto then asked for reconsideration and a jurisdictional hearing. The district court gave Whatley an opportunity to respond with affidavits before denying Masciopinto's motion to reconsider. The court found the affidavits sufficient to prove that Masciopinto had notice of the EEOC charge.

Masciopinto contends that the district court wrongly denied him a hearing on jurisdiction. He interprets our holding in *Crawford v. United States* as requiring an evidentiary hearing when a defendant requests one. 796 F.2d 924, 928 (7th Cir. 1986). His reliance on *Crawford* is misplaced. *Crawford* speaks of "documents that might obviate the need for oral testimony," *id.*, and states that "[o]ften the only evidence necessary to resolve a jurisdictional issue is documentary." *Id.* at 928-929. Masciopinto adds that

he was denied an opportunity to file a counter-affidavit because the district court ruled on his motion to dismiss on the day after the plaintiff's affidavit was filed and served by mail. However, there has been no showing that the result would have otherwise been different.

II.

Masciopinto is asking this Court to reject the Supreme Court's clear pronouncement in *Delta* that Rule 68 simply does not apply when defendants prevail. We are bound by the Supreme Court's interpretation of Rule 68 and therefore the district court's denial of Masciopinto's costs under Rule 68 was appropriate. Because the district judge did not erroneously deny the motion to dismiss and did not abuse her discretion in finding that this Title VII suit against Masciopinto was not frivolous, the denial of attorney's fees under 42 U.S.C. § 2000e-5(k) was also proper.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT—WITH ORAL ARGUMENT

Date: December 7, 1990

BEFORE:

Honorable William J. Bauer, Chief Judge
Honorable Walter J. Cummings, Circuit Judge
Honorable Frank H. Easterbrook, Circuit Judge

No. 90-2406

MARIAN J. WHATLEY,

Plaintiff-Appellee,

v.

PAUL MASCIOPINTO,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 89 C 2976, Judge Suzanne Conlon

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the District Court's judgment denying costs under Rule 68 and 42 U.S.C. sec. 2000e-5(k) in this case appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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Case Number: 89 C 2976 Date: March 30, 1990

Name of Assigned Judge: SUZANNE B. CONLON

Case Title: Marian J. Whatley v.
Super Low Food Center, Inc., et al.

* * * * *

DOCKET ENTRY:

(1) ☒ Judgment is entered as follows:

(2) ☐ [Other docket entry:]

Judgment is entered for defendants Super Low Food Center, Inc., Paul Masciopinto, Chris Kametas, and Nick Kametas and against plaintiff Marian J. Whatley on Count I. Enter attached Findings of Fact and Conclusions of Law.

/s/ Suzanne B. Conlon

* * * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| MARIAN J. WHATLEY, | ) | |
| | ) | |
| Plaintiff, | ) | 89 C 2976 |
| | ) | |
| v. | ) | Hon. |
| | ) | Suzanne B. Conlon |
| SUPER LOW FOOD CENTER, INC., | ) | |
| PAUL MASCIOPINTO, JAMES | ) | |
| KAMETAS, CHRIS KAMETAS, | ) | |
| NICK KAMETAS and AL KAMETAS, | ) | |
| | ) | |
| Defendants. | ) | |

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff Marian J. Whatley brings this action against her former employer, Super Low Food Center, Inc. ("Super Low"), Super Low's owners, Dimitrios Kametas, Chris Kametas, Nick Kametas and Eleftherios Kametas, and her former supervisor, Paul Masciopinto (collectively "defendants"). Whatley asserts that defendants violated Title VII by engaging in or permitting sexual harassment (Count I), that defendants terminated her employment in retaliation for filing a worker's compensation claim (Count II), that defendant Masciopinto slandered her (Count III), and that defendants intentionally inflicted emotional distress (Count IV).

A jury trial was conducted on Counts II through IV. The court considered the same evidence with respect to Count I. At the conclusion of Whatley's case, the court directed a verdict for all defendants as to Counts II and

III, and for defendants Dimitrios Kametas and Eleftherios Kametas on all counts. The jury returned a verdict for all remaining defendants and against Whatley on Count IV.

The court enters the following findings of fact and conclusions of law as to Count I, pursuant to Fed.R.Civ.P. 52(a).

## FINDINGS OF FACT

1. Whatley was employed by Super Low as a meat wrapper from 1984 to July 1, 1988, except for a three-week period in the summer of 1984, when she quit to work at another store.

2. Whatley was initially hired and later was rehired by Dimitrios Kametas.

3. Masciopinto became manager of Super Low's meat department and Whatley's supervisor in 1985.

4. The remaining defendants were owners and officers of Super Low. Chris Kametas managed the overall operation of the store, while Nick Kametas was responsible for purchasing, sales and pricing.

5. During her employment, Whatley was the only female employed in the meat department. When her employment ended on July 1, 1988, Whatley's responsibilities were assumed by male employees.

6. According to Whatley's testimony and that of two other former meat department employees, Eugene Anderson and David Caraballo, Masciopinto frequently used profane and vulgar language. Masciopinto denied he used offensive language, as did Gus Klios and Neville Cartwright. Klios and Cartwright are still employed by Super Low.

7. After observing the witnesses and hearing their testimony, the court finds the testimony that Masciopinto regularly used crude and profane language more credible than Masciopinto's testimony to the contrary. However, the credible evidence also established that Masciopinto used offensive language with male employees, as well as with Whatley.

8. Whatley admitted that she used profane language in the workplace herself.

9. Whatley testified that Masciopinto routinely made obscene gestures and comments to her while handling marrow bones and sausages. She also claimed that on one occasion in approximately October 1987, Masciopinto made a comment relating to her pubic hair. Former Super Low employees Anderson, Caraballo and Leopold each testified that they witnessed this misconduct by Masciopinto on one or two occasions. Masciopinto and current Super Low employees denied these accusations.

10. The court finds that the credible evidence established that on several occasions Masciopinto made sexually suggestive gestures and comments to Whatley. However, the court also finds that Whatley failed to establish that this misconduct occurred on a frequent, regular or pervasive basis.

11. Whatley testified that she complained about Masciopinto's misconduct to both Chris Kametas and Nick Kametas, but that they failed to take any corrective measures. The Kametas' denied that Whatley complained to them. The court finds the conflicting evidence on this issue inconclusive.

12. On July 1, 1988, Masciopinto yelled at Whatley for not placing enough ground meat out for customers. Whatley claims that Masciopinto ordered her "to get the fuck

out of here." Masciopinto, however, testified that Whatley responded to his criticism about insufficient ground meat by stating, "stick this job up your ass."

13. It is undisputed that after this confrontation over the ground meat, Whatley walked out of Super Low and never returned to work. Whatley later told Lois Heatner, a Super Low employee, that she "quit" her job.

14. Masciopinto did not have the authority to hire or fire employees. The evidence established that Whatley was aware of this fact. Whatley testified that in early 1988, Al (Eleftherios) Kametas told her she could return to work after Masciopinto told her she could not.

15. Whatley made no attempt to discuss her employment status with Dimitrios Kametas, who initially hired her and later rehired her, or the other owners of Super Low, after her confrontation with Masciopinto on July 1, 1988.

## CONCLUSIONS OF LAW

1. This court has jurisdiction over this matter pursuant to 42 U.S.C. § 2000e-5(f)(3).

2. To prevail on Count I, Whatley is required to establish by a preponderance of the evidence that she experienced verbal or physical conduct that was so severe or pervasive that it altered the conditions of her employment and created an abusive working environment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986); *Brooms v. Regal Tube Co.*, 881 F.2d 412, 418 (7th Cir. 1989); *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 213 (7th Cir. 1986). She has not done so.

3. Masciopinto's use of crude and profane language was directed at all employees, Whatley and her male co-

workers alike. Whatley admits using offensive language herself.

4. Masciopinto's use of obscene gestures and comments regarding marrow bones and sausages on one or two occasions, and his comment about Whatley's pubic hair once eight months before she left Super Low, were not shown by a preponderance of credible evidence to have been so severe or pervasive that Whatley's conditions of employment were altered.

5. Whatley failed to prove by a preponderance of the evidence that she was discharged or fired by any of the defendants.

6. Whatley's decision to leave Super Low on July 1, 1988 was based on a clash with her supervisor over a work-related matter and was not the result of any sexually abusive conduct.

7. In order to establish that she was constructively discharged from Super Low, Whatley must show that the defendants made her working conditions so intolerable that she was forced into an involuntary resignation. *Bartman v. Allis-Chalmers Corp.*, 799 F.2d 311, 314 (7th Cir. 1986), quoting *Vaughn v. Pool Offshore Co.*, 683 F.2d 922, 926 (5th Cir. 1982). The test is whether a reasonable employee would have felt compelled to resign under the circumstances. *Brooms*, 881 F.2d at 423. Whatley was obligated to seek legal redress while remaining in her job unless she was confronted with an "aggravated situation beyond ordinary discrimination." *Id.*, quoting *Bailey v. Binyon*, 583 F.Supp. 923, 929 (N.D.Ill. 1984).

8. While Whatley has established that Masciopinto was a heavy-handed, unpleasant manager who dealt poorly with others, his conduct was not shown by the preponderance of credible evidence to be so abusive that he

forced Whatley's resignation. *Miller v. State of Illinois*, 681 F. Supp. 538, 544 (N.D.Ill. 1988).

Accordingly, judgment is entered for defendants Super Low Food Center, Inc., Paul Masciopinto, Chris Kametas, and Nick Kametas and against plaintiff Marian J. Whatley on Count I.

ENTER:

/s/ Suzanne B. Conlon
United States District Judge

Dated: March 30, 1990

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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JUDGMENT IN A CIVIL CASE

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MARIAN J. WHATLEY

v. Case Number: 89 C 2976

SUPER LOW FOOD CENTER INC. et al

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☒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED enter judgment on the jury verdict entered on March 21, 1990 in favor of defendants Super Low Food Center Inc. et al and against the plaintiff Whatley.

Enter judgment in favor of defendants Kametas and Kametas and against plaintiff Whatley on counts II and III.

Enter judgment in favor of defendants Super Low Food Center Inc. et al and against the plaintiff Whatley on Count I.

No further proceedings are anticipated.

Date 30 March 1990

H. STUART CUNNINGHAM
*Clerk*

/s/ _____
*(By) Deputy Clerk*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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Case Number: 89 C 2976 Date: May 23, 1990

Name of Assigned Judge: SUZANNE B. CONLON

Case Title: MARIAN J. WHATLEY v.
SUPER LOW FOOD CENTER, INC., et al.

* * * * *

MOTION:

Defendants' Motion for Costs

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Defendants' motion for costs, including attorneys' fees, pursuant to Fed. R. Civ. P. 68 and 42 U.S.C. § 2000e-5(k) is denied. ENTER MEMORANDUM OPINION AND ORDER.

/s/ Suzanne B. Conlon

* * * * *

(12) ☒ (For further detail see

☐ Order on the reverse of

☒ order attached to the original minute order form.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| MARIAN J. WHATLEY, | ) | |
| | ) | |
| Plaintiff, | ) | 89 C 2976 |
| | ) | |
| v. | ) | Judge |
| | ) | Suzanne B. Conlon |
| SUPER LOW FOOD CENTER, INC., et al., | ) | |
| | ) | |
| | ) | |
| Defendants. | ) | |

MEMORANDUM OPINION AND ORDER

Marian Whatley sued her former employer, Super Low Food Center, its owners and her former supervisor for sexual harassment in violation of Title VII and for intentional infliction of emotional distress. Defendants gave Whatley an offer of judgment of $50,000 to settle the case pursuant to Fed. R. Civ. P. 68. Whatley refused defendants' offer of judgment. The case proceeded to trial and the jury returned a verdict in favor of defendants on the emotional distress claim. The court entered judgment in favor of defendants on Whatley's Title VII claim. Defendants now move for costs, including attorneys' fees, pursuant to Fed. R. Civ. P. 68 and 42 U.S.C. § 2000e-5(k).

**Rule 68**

An offer [of judgment] not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.

Fed. R. Civ. P. 68. Whatley would be obligated to pay defendants' costs incurred after their unaccepted offer of judgment only if judgment were entered for her in an amount less than the offer. Rule 68 does not apply here because judgment was entered in favor of defendants. *Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981). Defendants argue that *Delta Air Lines* is not controlling after *Marek v. Chesney*, 473 U.S. 1 (1985). *Marek* involved a case where the plaintiff had prevailed, but in an amount that was less than the offer of judgment. The Supreme Court found that attorneys' fees are recoverable as costs under Rule 68 if the statute upon which plaintiff sued defines costs to include attorneys' fees. *Marek*, 473 U.S. at 10. Nonetheless, several post-*Marek* decisions have affirmed the continuing validity of *Delta Air Lines*. *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 293 (6th Cir. 1989); *Trohoske v. McDonough Power Equip. Co.*, 118 F.R.D. 425, 426 (W.D. Pa. 1988); *Lewis v. Safeway Stores, Inc.*, 671 F. Supp. 361, 363 (D. Md. 1987).

Defendants admit that *Marek* did not directly overrule *Delta Air Lines*. Defendants contend, however, that *Marek* suggests the Supreme Court would no longer rule as it did in *Delta Air Lines*. Defendants provide little support for their argument. In *Delta Air Lines*, the Supreme Court gave two reasons why Rule 68 does not apply when judgment is entered for the defendant. First, the rule's plain meaning limits its application to cases where "the judgment finally obtained by the offeree is not more favorable than the offer." The court read "obtained by the offeree" to be synonymous with a judgment for the plaintiff. *Delta Air Lines*, 450 U.S. at 351. In addition, the Court found the plain meaning of the rule consistent with the purpose of encouraging settlement in a manner that is fair to both plaintiffs and defendants. *Id.* at 352-54. *Marek* upholds the rationale of *Delta Air Lines* by affirming a plain meaning interpretation of the rule that encour-

ages settlement in a neutral and fair manner. *Marek*, 473 U.S at 9-10. Moreover, *Marek* cites *Delta Air Lines* as binding authority. *Id.* at 5. The Supreme Court has not overruled or seriously questioned the rationale of *Delta Air Lines*. Defendants, as the prevailing parties, are not entitled to costs under Fed. R. Civ. P. 68.

**42 U.S.C. § 2000e-5(k)**

> In any action or proceeding under this title the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs . . . .

42 U.S.C. § 2000e-5(k). A prevailing defendant in a Title VII action should not be awarded attorney's fees unless the court finds the plaintiff's claim frivolous, unreasonable or groundless. *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 422 (1978). Defendants do not argue and this court does not find that Whatley's claim was frivolous, unreasonable or groundless. The fact that Whatley ultimately lost her case is not itself a sufficient justification for the assessment of fees. *Hughes v. Rowe*, 449 U.S. 5, 14 (1980). Defendants' offer of judgment and this court's findings both indicate that Whatley's claim had merit. Whatley did not prevail because she failed to establish a causal connection between the sexual harassment she experienced and her decision to resign. Conclusions of Law, March 30, 1990, ¶¶ 4-8.

Defendants' motion for costs, including attorneys' fees, pursuant to Fed. R. Civ. P. 68 and 42 U.S.C. § 2000e-5(k) is denied.

ENTER:

/s/ Suzanne B. Conlon
United States District Judge

May 23, 1990

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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Case Number: 89 C 2976 Date: June 18, 1990

Name of Assigned Judge: SUZANNE B. CONLON

Case Title: MARIAN J. WHATLEY v.
SUPER LOW FOOD CENTER, INC., et al.

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

The memorandum opinion and order issued May 23, 1990 is amended as follows: in line 5 of the first paragraph, "$50,000" should read "$5.000.".

/s/ Suzanne B. Conlon

* * * * *